No. 85-1722

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE SYNAGOGUE COUNCIL OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of Americans Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise clauses. To further these ends, AJCongress has filed briefs amicus curiae in numerous cases in state and federal courts in which the meaning of the religion clauses has been at issue.

As an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress easily accomodated free exercise of religion. In particular, AJCongress seeks to ensure

that the religious rights of the incarcerated are not infringed without compelling reasons.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of: Central Conference of American Rabbis, representing the Reform Rabbinate; Rabbinical Assembly, representing the Conservative Rabbinate; Rabbinical Counsel of America, representing the Orthodox Rabbinate; Union of American Hebrew Congregations, representing the Reform Congregations; Union of Orthodox Jewish Congregations of America, representing the Orthodox Congregations; and United Synagogue of America, representing the Conservative Congregations.

This brief is submitted with the consent of the parties.

STATEMENT OF THE CASE

Until March of 1984, all prisoners of the Islamic faith at Leesburg State Prison were permitted to attend Jumu'ah, an obligatory Islamic Sabbath service that takes place every Friday after the sun reaches its apex but before the next scheduled mid-afternoon prayer. Jumu'ah is the central service of the Islamac religion, commanded by the Quar'an, the Islamic holy book. Although other Islamic prayers are said individually, and can be made up if missed, the Jumu'ah service is mandatory, and must be performed in a congregation. (Tr. 20-22, 35-36, 297).[1]

The Jumu'ah service had taken place at Leesburg, without incident, for many

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[1] References to pages in the transcript of the District Court hearing are designated as Tr. ___.

years (Tr. 26-29, 96-97). After March, 1984, however, as the result of changes in several unrelated prison regulations, only the most dangerous of Leesburg's Muslim prisoners--the maximum security prisoners--were assured of their right to attend the Jumu'ah service. Prisoners who presented a lesser security risk--the gang minimum and full minimum prisoners--were effectively precluded from attending this obligatory religious service.[2]

Respondents in this case,

Sadr-Ud-Din Nafis Mateen and Ahmad Uthman

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[2] Prisoners at Leesburg, a medium security prison (Tr. 59), are assigned to three security classifications: maximum security, gang minimum or full minimum. Maximum security prisoners, posing the greatest security risks, work under close supervision within the main facility of the prison. Gang minimum prisoners, an intermediate custodial status, work outside the gates of the main building, also under supervision. Full minimum prisoners, who are housed at a minimum security facility called the "Farm," work outside the prison gates with minimal supervision.

Shabazz, were inmates at Leesburg, who had been practicing Muslims for many years (Tr. 18, 40). The sincerity of their religious beliefs was conceded (Tr. 18). At the time this action was commenced, Mateen and Shabazz were gang minimum prisoners--the intermediate security status.

In April, 1983, pursuant to a new corrections policy, Standard 853, inmates were required to pass through a period of gang minimum status before attaining full minimum status; also, to alleviate overcrowding in the main facility itself, all gang minimum prisoners were to be routinely assigned to work details outside the main prison facility (Tr. 56, 157, 166-169).

After Standard 853 went into effect, Mateen, like many other gang minimum Muslim prisoners, was assigned to an

outside work detail on Mondays through Thursdays, but an alternative detail, within the main facility, on Fridays, so that he could attend the Jumu'ah service (Tr. 26-27, 209). Shabazz, at that time, had a job inside the main building so he too could attend the service (Tr. 39-40). Full minimum prisoners were permitted to return to the prison by themselves on Friday to attend the service (Tr. 27-28, 210-211).

In March, 1984, two internal prison decisions brought these practices to an abrupt halt. First, on March 7, 1984, prison officials issued a memorandum forbidding any prisoners working outside details from returning to the main facility. According to prison officials, this policy taught prisoners that a workday must be productive and could not be interrupted for sundry personal reasons, and also alleviated traffic

congestion at the main gate (Tr. 50, 86-90, 159-160). The traffic problem, however, was neither attributable to Muslim gang minimum prisoners returning from outside work detail to attend the Jumu'ah service, since those prisoners, at the time the memo was issued, were assigned to details inside the prison itself, nor to Muslim full minimum prisoners, since they did not have to pass through the traffic gate to return to the Farm (Tr. 105-106, 117-119, 128-129).

March, 1984 also brought another change in policy. The alternative Friday work detail inside the prison, to which Muslim gang minimum prisoners, like Mateen, had been assigned was switched to a maximum security detail (Tr. 68-71, 175-177). Although maximum security and gang minimum prisoners mixed freely within the prison at other times, prison

officials refused to allow gang minimum prisoners to work on what had become a maximum security detail (Tr. 193). Thus, nearly all gang minimum prisoners were assigned to outside work details on Friday, and could not attend Jumu'ah without returning to the main facility, which was prohibited under the March 7, 1984 memo.

The combined effect of Standard 853, the March 7, 1984 memo, and the discontinuance of the Friday alternative work detail, was to preclude all but a few gang minimum and full minimum prisoners from attending the Jumu'ah service.

In May, 1984, Shabazz and Mateen filed this suit under 42 U.S.C. §1983 for injunctive relief and damages. They claimed that the policies in question denied them their First Amendment right to freely exercise their religion.

Following a hearing, the District Court acknowledged that respondents' free exercise rights had been infringed and that prison officials had adopted "the most restrictive alternative" to meet their goals. The court, following St. Claire v. Cuyler, 634 F.2d 109 (3rd Cir.), rehearing denied, 643 F.2d 103 (3d Cir. 1980), nevertheless deferred to the expertise of the officials and denied respondents any relief. Shabazz v. O'Lone. 595 F.Supp 928, 934 (D.N.J. 984).

Respondents appealed to the Third Circuit. The case was originally argued before a panel of the court, but the court, sua sponte, set down the matter for rehearing en banc.

The Third Circuit, by a vote of nine to two, vacated the decision of the district court. Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986). It concluded

that the standard for deciding prisoner's First Amendment free exercise claims it had announced several years earlier in St. Claire insufficiently protected a prisoner's free exercise rights since it did not require any inquiry into the feasability of accomodating those rights. The court therefore articulated a new standard requiring the state to show that there was no way to accommodate a prisoner's religious rights without sacrificing an important penological goal. 782 F.2d at 420.

Since the District Court had evaluated the case under the St. Claire standard, the Third Circuit remanded the case for reconsideration in light of its opinion.

SUMMARY OF ARGUMENT

1. Over ten years ago, this Court held that prisoners retain First Amendment rights that are neither inconsistent with their status nor with legitimate penological objectives. Pell v. Procunier, 417 U.S. 817 (1974). The right to freely exercise one's religion unquestionably survives the mere fact of incarceration. Cruz v. Beto, 405 U.S. 319 (1972). The question in this case, then, is how that right is to be protected without sacrificing the objectives of the prison system.

When a free exercise claim is raised outside the prison context, government must show both that a burden on religious liberty is necessary to accomplish a compelling interest, and that accommodating the religious rights of an individual would substantially harm the

interest involved. If accommodation is feasible, it must be made.

This method of analysis, which is essentially the same as the standard adopted by the Third Circuit in this case, should be used in evaluating the free exercise claim of a prisoner. When a prisoner's right to practice his religion is burdened by a prison regulation, prison officials should be required to demonstrate that the regulation is necessary to further the goals of security, rehabilitation, deterrence or protection of society, and that they cannot grant an exemption or otherwise accommodate the prisoner without jeopardizing one or more of these goals.

The standard of review advocated by petitioners and their amici supporters does not require prison officials to show any attempt at accommodation. Rather, it

is enough for prison officials to merely articulate a credible reason why a challenged regulation is necessary. Contrary to petitioners' arguments, requiring prison officials to prove that accommodation is not possible would not prevent the courts from deferring to the expertise of prison officials. Nor would it unduly involve the courts in prison administration. It would simply insure that prisoners are not too quickly deprived of their fundamental right to religious liberty.

2. Applying traditional free exercise analysis to a prisoner's claim is also consistent with this Court's decisions on the rights of prisoners. Great deference has been accorded to prison officials when a right is considered inconsistent with the fact of incarceration, or when a practice is patently dangerous. Free exercise rights, however, are plainly

consistent with incarceration, and rarely, if ever, do religious practices pose unquestionable danger. Certainly, congregate religious worship, the practice at issue here, which took place at this prison for years without incident, does not fall into this category.

This Court has also upheld limited time, place and manner restrictions on the exercise of prisoner free speech rights, stressing that such restrictions still allow for alternative methods of communication. When a prisoner is prevented from engaging in a particular religious practice, it cannot be viewed as a limited time, place or manner restriction. In this case, a series of regulations operated to preclude most minimum security Muslim prisoners from exercising their right to attend the obligatory Jumu'ah service. Since those regulations totally prevented Muslim

prisoners from exercising a protected right, it should be incumbent on prison officials to show that the regulations furthered a compelling interest and that no accommodation was possible.

ARGUMENT

INTRODUCTION

More than a decade ago, in Procunier v. Martinez, 416 U.S. 396, 405 (1974), this Court held that "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." It is now well-established that "a prisoner does not shed...basic First Amendment rights at the prison gate," id. at 422 (Marshall, J., concurring), but "retains those First Amendment rights that are not inconsistent with his status as a

prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974). Among those "retained" rights, perhaps occupying even a preferred position, is the right to free exercise of religious beliefs. Hudson v. Palmer, 468 U.S. 517, 104 S.Ct 3194, 3198 (1984); Cruz v. Beto, 405 U.S. 319, 322 n. 2 (1972) (per curiam).[3]

Although this proposition is now well-accepted, for many years a prisoner was deemed a "slave of the state," who, by virtue of incarceration, had forfeited not only his liberty, but his constitutional rights as well. Jones v. North Carolina Prisoner's Labor Union,

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[3] See generally Remmers v. Brewer, 361 F.Supp 537, 540 (S.D. Iowa 1973), aff'd, 494 F.2d 1277 (8th Cir.), cert denied, 419 U.S. 1012 (1974); Pfeffer, The Supremacy of Free Exercise, 61 Geo L.J. 1115 (May 1973); Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal L.Rev. 753, 778 (Sept. 1984).

Inc., 433 U.S. 119, 139 (1977) (Marshall, J., dissenting), quoting Ruffin v. Commonwealth, 62 Va (21 Gratt) 790, 796 (1871). The courts adopted a "hands off" posture, according absolute deference to prison administrators despite undeniable constitutional violations. See generally Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal To Review The Complaints of Convicts, 72 Yale L.J. 506 (1963).

This much discredited "hands off" policy has once again resurfaced in the arguments of petitioners and the United States as amicus curiae.[4] The Third Circuit, however, has decided that "hands off" is neither consistent with this Court's traditional approach to free exercise claims nor dictated by its prisoners' rights cases.

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[4] The attorney generals of several states have also supported petitioners.

The Third Circuit's decision relies on the test this Court has developed over the years for evaluating free exercise claims. Under that test, when a governmental regulation infringes on an individual's sincerely held religious beliefs, government must show that the regulation serves an especially important interest and that the religious rights of the individual cannot not be accommodated without jeopardizing that interest.

POINT I

TRADITIONAL FREE EXERCISE ANALYIS SHOULD BE APPLIED TO A PRISONER'S FREE EXERCISE CLAIM

In a long line of cases, this Court has held that government cannot place a burden on religious liberty unless that burden "is essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-258

(1982). Recognizing the paramount importance the Free Exercise Clause plays in preserving our religious liberty, the Court has closely scrutinized any governmental infringement on that liberty, and has required the state to "justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." Thomas v. Review Board of Indiana Employment Inc., 450 U.S. 707, 718 (1981). See also Bowen v. Roy, 106 S.Ct 2147, 2167 (1986) (O'Connor, J.) (government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means"); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963).

Although the test has been phrased in a number of ways, Justice O'Connor's

recent formulation in Goldman v. Weinberger, 106 S.Ct 1310, 1325 (1986) (O'Connor, J. dissenting), is particularly apt:

> First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake....Second, the government must show that granting the requested exemption will do substantial harm to that interest....Those two requirements are extremely sensible in the context of the assertion of a free exercise claim. First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of special importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the i terest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.[5]

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[5] Although Justice O'Connor wrote in dissent in Goldman, and the majority concluded that the military's interest in uniformity prevailed over the plaintiff's right to wear a yarmulke while on duty, the analysis of free exercise precedent by Justice O'Connor was not an issue in dispute.

This traditional free exercise test, we submit, should be used in evaluating the free exercise claims of a prisoner.

A. Traditional Free Exercise Analysis Allows For Mutual Accommodation of Both Prison and Free Exercise Concerns

Petitioners ask the Court to do away with its well-established standard of review when a prisoner's religious liberty is at stake. It is inappropriate, petitioners claim, for the judiciary to closely examine the decisions of prison officials, even when those decisions "override an interest specifically protected by the Bill of Rights." Since prison officials possess special expertise on how their institutions can best be run, petitioners further claim, the court should categorically defer to their decisons even when they collide with paramount constitutional concerns.

The special nature of the prison environment, however, does not mandate a different standard of judicial review. The traditional free exercise test is sufficiently flexible to take into account the unique problems and unique goals of the prison system.[6] See generally Hutchison, Analyzing the Religious Free Exercise Rights of Inmates: The Significance of Pell, Jones, and Wolfish, XI NYU Rev. of Law & Social Change 413 (1982-1983).

This Court has already identified the four objectives of prison administration--rehabilitation, deterrence, protection of society, and maintaining institutional security. Pell v. Procunier, 417 U.S. at 822. If prison

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6 See Goldman v. Weinberger, 106 S.Ct. 1310, 1317, n. 2. (Brennan, J. dissenting) and 106 S.Ct at 1325 (O'Connor, J. dissenting) (both recognizing that the traditional test can consider special needs of military).

officials demonstrate that a prison regulation is necessary to further one of these objectives, they will have met their initial burden of showing a compelling interest.[7] But significantly, prison officials would still have to show that the religious practice the prisoners seek to engage in cannot be accommodated without jeopardizing that interest.

Without doubt, officials will frequently be able to meet this second burden of proof. Nevertheless, requiring

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[7] Contrary to petitioners' assertions, under traditional free exercise analysis (or under the similar standard announced by the Third Circuit), prison officials will neither have to prove "past breaches of security," nor be prevented from "forestalling" future security problems (Petitioners' Brief at 19). If prison officials demonstrate through credible testimony that were it not for the contested regulation, security would be endangered, they will have met their initial burden of proof.

prison officials to show that they seriously considered ways of protecting the religious rights of their prisoners, ensures that those rights are neither ingored nor unjustifiably abridged.[8]

Petitioners claim that a strict standard of judicial review would open the proverbial floodgates (Petitioner's Brief at 31-32)--that prisoners would file innumerable frivolous claims; or, according to the Solicitor General, couch in free exercise terms a claim based on another right or even go so far as to "convert" to obtain certain privileges. (Solicitor General Brief at 22).

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[8] Even outside the prison context, the government often prevails against a free exercise claim if it shows that accommodating a religious belief would unduly interfere with an overriding governmental interest. See, e.g., United States v. Lee, 455 U.S. 252 (1982) (Amish required to pay social security taxes); Bob Jones University v. United States, 461 U.S. 574 (1983) (tax exempt status denied schools with racially discriminatory policies premised on religious beliefs).

Bogus religious claims, as the Solicitor General concedes, can be weeded out by prison officials, and, more importantly, by the courts. A valid free exercise claim, always requires an inquiry into the "sincerity" of the belief in question, United States v. Ballard, 322 U.S. 78 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972), and since prisoners may have greater incentive to lie, this inquiry can be more probing in the prison context. Cf. Africa v. Commonwealth of Pennsylvania, 666 F.2d 1025, 1031 n. 10 (3d Cir. 1981); Wiggens v. Sargent, 753 F.2d 663 (8th Cir. 1985). See generally Comment, The Religious Rights of the Incarcerated, 125 U. of Pa. L.Rev. 812, 861 n. 306 (1977).

Disciplinary sanctions may even be appropriate if a prisoner has fabricated a religious belief to obtain a privilege, as prison officals testified that some

prisoners did at Leesway in order to avoid outside work details. But that some prisoners abuse their rights does not justify depriving those, like respondents in this case, whose sincerity is unquestioned.

Moreover, the mere threat of frivolous lawsuits cannot alone justify an erosion of legislative, common law, or, especially, constitutional rights. See Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820, 2826 (1984); Patsy v. Florida Board of Regents, 457 U.S. 496, 512 n. 13 (1982):

> Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for disposing of unfounded claims; if they are inadequate to protect [prison officials] from vexatious litigation, then there is something wrong with those procedures, not with the [First Amendment].

Hoover v. Ronwin, 466 U.S. 558, 104 S.Ct. 1989, 2012 (1984) (Stevens, J., dissenting).

Finally, giving special recognition to the professional judgment of prison officials is not inconsistent with heightened scrutiny. There is simply no reason why requiring prison officials to try, whenever possible, to accommodate the religious practices of prisoners would involve a federal court in the minutiae of prison administration, or allow a federal court to impose "unworkable restrictions" on prison officials. (Petitioners' Brief at 31-33).

B. Neither The St. Claire Standard Nor The Reasonable Relationship Test Adequately Protects Prisoner Free Exercise Rights

In determining whether an especially important governmental interest is at stake and whether it can be served

without burdening an inmate's religious rights, the courts can and should defer to the special expertise of prison officials. But they cannot and should not allow judicial deference to rise to the level of judicial abdication.

Yet that is precisely what has happened when the courts have embraced a less exacting standard than that traditionally used in evaluating free exercise claims. The standard initially adopted by the Third Circuit in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980) (and in this case, abandoned), is perhaps the most common of these less rigorous standards. Under St. Claire, once an inmate proves that a prison practice infringes on a sincerely held religious belief, the state need only:

> produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security. This evidence may

> consist of expert testimony from the responsible officials, provided they testify to opinions that are "held 'sincerely' and [are] arguably correct."

St. Claire, 634 F.2d at 114, quoting Jones v. North Carolina Prisoners Union, Inc., 433 U.S. 119, 127 (1976).

Once the state's minimum burden is met, the court must defer to the officials' expert judgment, unless the inmate then proves by "'substantial evidence...that the officials have exaggerated their response' to security considerations...or that their beliefs are unreasonable." Id. at 115, quoting Pell v. Procunier, 417 U.S. 817, 827 (1974).[9] This inmate burden is a

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[9] Both Pell and Jones were taken out of context by the Third Circuit. As we show later in the brief (at pps. 34-52 infra) the standard embraced by the St. Claire court, purporting to rely on Pell and Jones, is appropriate only when the practice in question is presumptively dangerous or when the rights at issue are not retained by prisoners or can be exercised through alternative means.

heavy one. See, e.g., Wilson v. Schellinger, 761 F.2d 921, 927 (3d Cir. 1985).

The St. Claire standard allows a prison official, in effect, to act as a judge in his own case. If he decides that a particular religious practice is to be prohibited, or as in this case, if other regulations effectively preclude a religious practice although it is not expressly prohibited, the official need only articulate some "arguably correct" reason for his decision. Once he has done that, the court must accept his decision without question even if it is simply a post hoc rationalization of what is in fact an ill-considered, perhaps even biased, decision.

The prison official need not show that an overriding governmental "interest will in fact be substantially harmed by

granting the type of exemption requested by the individual." Goldman v. Weinberger, 106 S.Ct at 1325 (O'Connor, J., dissenting). He need not even explain why accommodation is not feasible. He need only state his belief, that is all.

Although petitioners suggest that the St. Claire test affords adequate protection to prisoners, experience has shown otherwise. When the St. Claire test is applied, appellate courts have time and time again deferred absolutely to prison officials despite substantial evidence that a prison regulation was unjustified or that security concerns were "substantially exaggerated."

Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985) is a telling example. That case involved a regulation forbidding a prisoner from growing a beard. A Muslim prisoner challenged the regulation. The

district court, after an evidentary hearing, found that the grooming regulation was neither reasonable nor substantially justified by considerations of prison security and further found that there was substantial evidence that the claims of a security risk were largely exaggerated. 774 F.2d at 343. The sole defense witness, the prison warden, had been unduly flippant at the hearing, and had grossly overestimated both the number of prisoners who would decide to grow beards were accommodation of Muslim rquests granted, and the number of photographs that would have to be taken for identification purposes.

The Eighth Circuit reversed, according overwhelming deference to the opinion of a warden who was found by the trier of fact to be both uninformed and hostile to First Amendment rights, despite significant evidence that

security would not be jeopardized were Muslim religious concerns accomodated.[10]

The Solicitor General recommends that this Court adopt a "reasonable relationship standard," under which a prison official need only show that a particular regulation is "reasonably related to a legitimate penological interest." The Solicitor General accurately equates this with the St. Claire standard, yet contends that it adequately protects the free exercise rights of prisoners. (Solicitor General Brief at 25-26). To support this assertion, he cites a few cases that do

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[10] See also Cole v. Flick, 758 F.2d 124 (3d Cir. 1985) (disregarding district court findings of unreasonableness and substantial exaggeration); Dettmer v. Landon, 799 F.2d 929 (4th Cir. 1986) (despite findings by district court of sustantial exaggeration, deference required reversal).

not raise free exercise concerns, and one case that does, Barrett v. Virginia, 689 F.2d 489 (4th Cir. 1982).

In Barrett, the Fourth Circuit struck down a categorical ban on inmate name changes, despite testimony from prison officials that name changes are disruptive and create security problems. Clearly, the regulation would have been upheld under the St. Claire standard, since the official had articulated an arguably correct, sincerely held belief.

The Fourth Circuit's standard was far more rigorous; indeed, in Gallahan v. Hollyfield, 670 F.2d 1345 (4th Cir. 1982), that Circuit employed a "less restrictive alternatives" test in invalidating a prison grooming regulation that interfered with an inmate's religious beliefs, although similar regulations have invariably been upheld

under the St. Claire test. See, e.g., Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985); Cole v. Flick, 758 F.2d 124 (3rd Cir. 1985). In any event, that a prisoner prevailed in a single case hardly demonstrates that a "reasonable relationship" standard adequately protects inmate rights, unless the Solicitor General believes that any standard that allows an inmate to prevail more than once is too liberal.

The great merit of traditional free exercise analysis is that it protects the interests of the government but also ensures that prison officials neither underestimate the value of religion to the prison population nor too freely deny religious practices that could be allowed without creating significant risk. Any less exacting standard allows a prisoner's most fundamental right to religious liberty to exist solely at the whim of prison officials.

POINT II

THE TRADITIONAL FREE EXERCISE TEST COMPORTS WITH THIS COURT'S PRIOR DECISIONS ON PRISONERS' RIGHTS

Applying traditional free exercise analysis to a prisoner's religious claim is entirely consistent with this Court's prior decisions addressing the scope of a prisoner's constitutional rights. Although the Court has frequently spoken of the judicial deference owed to prison officials, it has never suggested that judicial deference would substitute for judicial review of either the importance of the interest asserted by prison officials or of the feasability of accommodating both the liberty interest of the prisoner and the governmental interest involved.

Indeed, most of the cases decided by this Court addressed the entirely different question of whether a right

existed in the prison context, see, e.g., Hudson v. Palmer, 468 U.S. 517 (1984) (prisoners do not have privacy rights in their cells); Block v. Rutherford, 468 U.S. 576 (1984) (due process rights not infringed by blanket prohibition on contact visits), and therefore whether any balancing of competing interests was even involved. But when a prisoner's "retained" constitutional right is clearly implicated, this Court has never countenanced an absolute deprivation of that right, as would occur here, in the name of judicial deference, unless, unlike here, the right involves a practice so clearly dangerous, its prohibition is plainly justified. See, e.g., Jones v. North Carolina Prisoner's Labor Union, Inc. 433 U.S. 119 (1977) (prison unions presumptively dangerous).

Recently, the Second Circuit Court of Appeals, in Abdul Wali v. Coughlin,

754 F.2d 1015 (2d Cir. 1985), has interpreted, correctly, we believe, this Court's cases as suggesting a three part test for determining the appropriate standard of review in prisoners' rights cases. The test takes into account the nature of the right being asserted by the prisoners, the type of activity in question, and whether the challenged regulation prohibits or merely limits the exercise of the right being asserted. 754 F.2d at 1033.

Under the Second Circuit's test, judicial deference should be "nearly absolute" when the right asserted "is found not to exist within the prison context, i.e., where it is held to be inherently inconsistent with established penological objectives." Id. at 1033. Judicial deference should be "extremely broad, though not categorical" when the prisoners seek to engage in a practice

"presumptively dangerous." Id. And finally, wide ranging deference is appropriate to time, place and manner restrictions that "proscribe only one of numerous available means of enjoying protected liberties." Id. But, as in this case, when:

> the activity in which prisoners seek to engage is not presumptively dangerous, and where official action (or inaction) works to deprive rather than merely limit the means of exercising a protected right, professional judgment must occasionally yield to constitutional mandate. In these limited circumstances, it is incumbent upon prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than than than necessary to effectuate the governmental objective involved.

Id., citing Procunier v. Martinez, 416 U.S. 396, 413.[11]

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[11] The Second Circuit's analysis in Wali has recently been adopted by other courts. See Safley v. Turner, 777 F.2d

A. Freedom of Religion is Consistent with a Prisoner's Status and with Penological Objectives

Prisoners retain the right to religious liberty guaranteed under the First Amendment. Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 3198 (1984). Unlike the right to freely associate, Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119, 126 (1977), or the right to privacy within the confines of a prison cell, Hudson v. Palmer, 468 U.S. 517, (1984), (1984), both of which are necessarily curbed by lawful incarceration, freedom of religion is entirely consistent with one's status as a prisoner.

1307, 1311 (8th Cir. 1985); Robinson v. Palmer 619 F.Supp 344, 347-348 (D.D.C. 1985); Fromer v. Scully, 84 Civ. 5612 (CES) (S.D.N.Y. Nov 25, 1986) (applying Wali to a free exercise claim).

Free exercise rights are also very different from due process rights. While prisoners undoubtedly retain limited due process rights, Wolff v. McDonnell, 418 U.S. 539 (1974), the whole issue in a due process case is whether those limited rights require a particular practice or procedure. To the extent due process does not require, for example, a hearing before a transfer to a different facility, Meachum v. Fano, 427 U.S. 215 (1976); or a right of confrontation at a disciplinary hearing, Wolff v. McDonnell, those practices, unlike religious practices, are deemed inconsistent with one's status as a prisoner.

Rather than being disruptive of prison objectives, many believe that prison authorities should encourage religious practice because it fosters the rehabilitative process. See, e.g., Barnett v. Rodgers, 410 F.2d 995, 1002

(D.C. Cir. 1969) ("religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality").[12]

The particular free exercise right at issue in this case--the right to attend a congregate religious service--is no less consistent with penological objectives. Congregate worship is common to many, if not most, organized religions and its protection against govenmental intrusion is integral to any true freedom of religion:

> Most religious faiths give a central role to congregate religious services. It is an important aspect of religious socialization, and it imparts a sense of religious fellowship which deepens religious conviction. Prisoners are cut off from most kinds of normal

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[12] See also H. Barnes & N. Teeters, New Horizons in Criminology 492-495 (3d. ed. 1959); Comment, The Religious Rights of the Incarcerated, 125 U. of Pa. L.Rev. 812, 854 (April 1977).

> social intercourse. Government should consider the matter carefully before walling prisoners off from congregate religious services which many believe reinforce norms of behavior which may help the inmate avoid future criminal conduct.

Wicker v. Mintzes, 771 F.2d 920, 930 (6th Cir. 1985)[13]

Since prisoners retain the right to freedom of religion, this Court's cases addressing rights inconsistent with incarceration are not dispositive. The categorical deference accorded prison officials when they enforce rules that abridge rights of association or privacy is simply out of place in the context of a free exercise claim.

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[13] In Wicker, the Sixth Circuit held that congregate religious services could be denied "only when paramount security interest [sic] so dictates." 771 F.2d at 930. See also Caldwell v. Miller, 790 F.2d 589, 598 (7th Cir. 1986).

B. Congregate Religious Worship is Not Presumptively Dangerous

This Court's prior decisions on prisoners' rights are different from this case in another significant respect. In those cases, prison officials had determined that a particular practice was itself dangerous and therefore had to be prohibited.[14] Some of those practices, certainly the union activities in Jones and the contact visits in Block v. Rutherford, 468 U.S. 576 (1984), could be viewed as presumptively dangerous. See Abdul Wali 754 F.2d at 1031-1032.

Petitioners concede that attendance at the Jumu'ah service poses no security risk--that service took place for many

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[14] For example, media interviews in Pell v. Procunier, 417 U.S. 817 (1974); union activities in Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119 (1977); receipt of hardcover books in Bell v. Wolfish, 441 U.S. 520 (1979); and contact visits in Block v. Rutherford, 468 U.S. 576 (1984).

years without incident. Rather, having instituted a series of rules that had the unintended effect of prohibiting attendance at Jumu'ah, petitioners, after the fact, have attempted to justify their refusal to accommodate the religious requests of Muslim prisoners by raising a host of security concerns unrelated to the religious practice itself. No sensible reason exists for according such an infringement on religious liberty nearly absolute deference.

C. Wide Ranging Deference is Accorded Only When a Retained Right is Limited, not Totally Prohibited

Because of several prison regulations designed to deal with other unrelated prison concerns, Muslim minimum security prisoners at Leesburg State Prison have been absolutely deprived of their right to attend a fundamental and

obligatory weekly religious service. That service, by its terms, is tied to a specific time: the same words said even in a congregated setting at some other time of day are simply not Jumu'ah.[15]

This case, therefore, highlights what distinguishes a free exercise case from this Court's prisoner free speech cases. While the right to free speech may be restricted by reasonable time, place and manner regulations, provided alternative means of communication are made available, courts cannot reshape religious practices or determine whether a prisoner's religion as a whole is adequately observed when he is prohibited from engaging in one religious practice, but allowed another. Neither the courts nor prison officials are entitled to

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[15] Thus, the offer, reiterated in petitioners' brief (at p. 36), to allow Jumu'ah to be said later in the afternoon wholly fails to address respondents' constitutional claim.

alter religious obligations in light of what they believe to be necessary or desireable. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709-710 (1976); Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 715-716 (1981).[16]

Yet when this Court has addressed First Amendment free speech rights of prisoners it has consistently emphasized that the far-reaching deference to be

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[16] For these reasons, Safley v. Turner, 777 F.2d 1307, 1312 (8th Cir. 1985), cert. granted sub. nom, Turner v. Safley, 106 S.Ct 2244 (1986), on which petitioners rely (Pet. Brief at 38-39), in asserting that this case involves a limitation and not a deprivation of a protected right is, we submit, incorrect in its analysis of free exercise claims. Certainly, the ban on inmate to inmate correspondence at issue in Safley was no more and was probably less "total" than the absolute prohibition against attending religious service in Otey v. Best, 680 F.2d 1231 (8th Cir. 1982), against wearing religious garb in Rogers v. Scurr, 676 F.2d 1211 (8th Cir. 1982), or against attending Jumu'ah in this case.

accorded to prison officials is based largely on the availability of adequate alternative methods of exercising the free speech right.

Pell v. Procunier, 417 U.S. 817 (1974), for example, which is the genesis of the "substantial exaggeration" test employed in St. Claire and other free exercise cases, involved a prison regulation prohibiting inmates from conducting face to face interviews with the media. Prisoners remained free to communicate with family, friends, legal counsel and clergy, all of whom could then communicate with the media. Id at 828.

In upholding the regulation, the Court characterized it as a reasonable "time, place and manner" restriction given the many "alternative means of communication permitted under the regulations with persons outside the prison." Id. at 823 and 826.

Although, in the absence of exaggeration, prison officials would be entitled to deference when they enforced limited restrictions on free speech, the Court stressed that:

> courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation. Id. at 827 (emphasis added).

Several years later, in Jones v. North Carolina Prisoners Labor Union, Inc., 433 U.S. 119 (1977), this Court upheld a prohibition on inmates soliciting other inmates to join a prisoners' union; on union meetings; and on bulk mailings of union literature. The case primarily dealt with the right

of association, quite clearly "the most obvious of the First Amendment rights that are necessarily curtailed by confinement." Id. at 126. Therefore, any restriction on that right was permissible if rationally related to prison administration objectives. Id. at 129.

First Amendment free speech rights, in contrast, were "barely implicated" in the case. Id. at 130. Significantly, when free speech rights were involved, i.e. the limitation on bulk mailing and the indirect effect on the prisoners' ability to communicate their grievances, the Court, as in Pell, stressed that alternative methods of speech remained available--individual mailings and internal grievance procedures. Id. at 130-131 and n.6.

In the only other decision of this Court to explicitly address an inmate's First Amendment rights, Bell v. Wolfish,

441 U.S. 520 (1979), this Court again made clear that the less exacting standard of review accorded to time, place and manner restrictions on speech is appropriate only when alternative means of expression are permitted. In Bell, a prison rule prohibited pretrial detainees from receiving hardcover books unless they were sent by bookstores, publishers or bookclubs.

Although invoking the substantial exaggeration language of Jones and Pell, the Court also emphasized that there were "alternative means of obtaining reading material that have not been shown to be burdensome or insufficient." Id. at 552. Hardcover books could still be received from certain sources; softcover books and magazines could be received from any source; and the prison had a large

library:

> In sum, considering all the circumstances, we view the rule, as we now find it, to be a "reasonable 'time, place and manner' regulation [that is] necessary to further significant governmental interests...."

Id. at 552, quoting Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

When a prison regulation forbids a prisoner from exercising a central tenet of his religion, it cannot be considered merely a limited "time, place and manner" restriction. The ban on a particular religious practice, which to the prisoner may be the most essential practice of his religion, is total, even if the prison allows the prisoner some latitude in exercising his religion in other ways.

There may well be instances where a religious practice can be accomplished in different ways--for example, a service might be appropriate in either the morning or the afternoon. In such a

case, the prison need only articulate an arguably correct reason for requiring the service to be held at one time, but not the other. Either way, the religious beliefs of the prisoners are being honored.

Jumu'ah is not one of those practices. If the prayers which constitute Jumu'ah are not recited at a certain time, they are not Jumu'ah. And if a prisoner sincerely believes that his religion requires him to participate in Jumu'ah, it is of no consequence that he is allowed a religious diet, or religious literature, or time for private prayer.

When a prison regulation operates to ban a religious practice, as it clearly does in this case, prison officials should be required to demonstrate that the regulation furthers a compelling prison goal and that the prison objective at issue would "in fact be substantially

harmed by granting the type of exemption requested" by the prisoner. Goldman v. Weinberger, 106 S.Ct at 1325 (O'Connor, J. dissenting).

CONCLUSION

Requiring prison officials to demonstrate that legitimate penological objectives would be sacrificed if they were to accommodate the religious beliefs of prisoners places no undue burden on prison administration. The District Court here, however, evaluated the respondents' claims under a standard that substituted deference for serious review of the feasibility of an accommodation. The Third Circuit correctly ordered a remand for a closer examination of whether Muslim prisoners could be accommodated without jeopardizing security or rehabilitative concerns.

Although the District Court heard limited testimony on the difficulties the

prison foresaw in accommodating its Muslim prisoners, it did not closely scrutinize that testimony, much of which was vague and unfocused. More exacting scrutiny is needed, for example, of the justification given for refusing to permit alternative Friday work details for the few Muslim prisoners who sincerely believed that their religion compelled attendance at Jumua'ah. At the hearing, the prison officials raised the problem of so-called "affinity groups," asserting very generally that it would be dangerous to allow a work detail comprised mainly of one religious group. No serious evaluation was given to this contention.

Nor was any scrutiny given to the reason why a Friday work detail could not be comprised of non-Muslim and Muslim prisoners, since work was apparantly available, or of minimum and maximum security prisoners, since both types of

prisoners mix freely at other times within the prison.

It may well be that, after a remand, the court will find that there is no feasible way to accomodate the Muslim prisoners who want to attend Jumu'ah. If it does so, however, it should have before it a record that fully explores the reasons why accommodation is not possible.

The judgment of the United States Court of Appeals for the Third Circuit, therefore, should be affirmed.

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